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# JUDICIAL BALANCING OF USES FOR PUBLIC PROPERTY: THE PARAMOUNT PUBLIC USE DOCTRINE

Joris Naiman\*

## I. INTRODUCTION

If a public entity seeks to take property that is owned not privately but by another public entity, how should a court decide which entity prevails? Paramount public use is a doctrine addressing takings between two entities that both hold eminent domain.<sup>1</sup> The doctrine prescribes a somewhat unusual judicial role to meet this equally unusual situation.<sup>2</sup> Pursuant to this doctrine, a court balances competing uses for particular public property,<sup>3</sup> making a policy determination of which use of the property better serves the public necessity.<sup>4</sup> Despite placing a court in a seemingly unorthodox, policy-making role, the paramount public use doctrine enables rational choice of public property uses.<sup>5</sup>

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<sup>1</sup> The doctrine addresses only those public property use conflicts that are not determined by statute. See *infra* notes 36-37 and accompanying text.

<sup>2</sup> Proceedings between two holders of eminent domain are only unusual in the sense that they are less common than takings of private property. Conflicts between holders of eminent domain arise regularly, because of the number of such potential parties and the scope of their activities. See Comment, *Balancing Public Purposes: A Neglected Problem in Condemnation*, 35 ALB. L. REV. 769, 769-70 n.3 (1971) (there are over 400 different condemnors in the State of New York).

<sup>3</sup> See, e.g., *infra* notes 109-24 and accompanying text. See generally Ball, *Intergovernmental Conflicts in Land Acquisition: Adjustment for Maximum Public Benefit*, 10 OHIO ST. L.J. 30, 34-35 (1949).

<sup>4</sup> The scope of the court's policy determination is limited to conform with the role of the courts in government. See *infra* text accompanying note 197; see also 1A J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 4.11[4] (rev. 3d ed. 1985) (legislature may give courts the duty of determining necessity of takings) [hereinafter NICHOLS].

<sup>5</sup> See *infra* text accompanying note 192.

Judicial review in most eminent domain proceedings is limited.<sup>6</sup> A court will not entertain arguments that a taking, or "condemnation," of private property is unnecessary or will create little public benefit.<sup>7</sup> Courts consider the necessity for a taking to be an issue of policy for the legislature, rather than an issue of law.<sup>8</sup>

Both a legislature and a "general condemnor" entity granted eminent domain by statute may take private property without judicial review of the necessity for the taking.<sup>9</sup> The distinction between a legislature and a general condemnor becomes important to judicial review when *public* property is condemned.<sup>10</sup> A court will not review the necessity of a taking of public property by a legislature.<sup>11</sup> Courts regard the necessity of changing public uses, like the necessity of taking private property, as a policy question for legislative determination.<sup>12</sup> If property is sought to be taken by a general condemnor, however, and if the condemnee entity also has the powers of a general condemnor, then a court may have difficulty divining legislative intent.<sup>13</sup> A court may be forced into an independent review of policy to resolve the conflict between two general condemnors.<sup>14</sup>

Rather than adopt a mechanical rule that defers to either the general condemnor acting in the role of a condemnee or the general condemnor acting as condemnor, a court may perform a judicial balancing of public uses.<sup>15</sup> The balancing test considers facts presented by both parties.<sup>16</sup> Each party's need for the contested property, and the public utility of each party's use, are weighed.<sup>17</sup> In the resulting adversarial proceeding, a court's deference to the condem-

<sup>6</sup> 1A NICHOLS, *supra* note 4, § 4.11[1], at 4-198.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4-198 to 4-199.

<sup>9</sup> See, e.g., 11 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.20 (3d ed. 1983) (municipality may take for "every necessary purpose" under general power to condemn).

<sup>10</sup> See *id.* § 32.67 ("general authority" is insufficient to enable taking of property already devoted to public use); 1 NICHOLS, *supra* note 4, § 2.2, at 2-58 ("general delegation" of authority is insufficient to take public property).

<sup>11</sup> 1 NICHOLS, *supra* note 4, § 2.2. "[T]he character of the 'res' as public property, generally, has no inhibiting influence upon the [sovereign's] exercise of [eminent domain]." *Id.* at 2-55.

<sup>12</sup> See *United States v. Carmack*, 329 U.S. 230 (1946). "The comparative desirability and necessity for the [condemned] site [are] matters for legislative or administrative determination rather than for a judicial finding." *Id.* at 247.

<sup>13</sup> Cf. 1 NICHOLS, *supra* note 4, § 2.2[3] (conflict between policies of preserving prior use and enabling more necessary public use compounded by judicial disinclination to intrude upon legislative policy-making function).

<sup>14</sup> See *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 580, 120 A.2d 593, 597 (1956).

<sup>15</sup> See Ball, *supra* note 3, at 33-35.

<sup>16</sup> See *id.* at 36-37.

<sup>17</sup> See *Weehawken*, 20 N.J. at 580, 120 A.2d at 597 (quoting 2 J. LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 440 (3d ed. 1909)).

nor's quasi-legislative determination of necessity is balanced by equal deference to the condemnee.<sup>18</sup> The result is judicial review of the necessity for a taking.<sup>19</sup>

Judicial balancing of uses results in a determination of the "paramount public use."<sup>20</sup> To avoid the appearance of making policy, a court may refer to its balance as a search for legislative intent, implied in fact.<sup>21</sup> If a court balances facts presented by both parties, however, it is effectively making a policy choice.<sup>22</sup> The justification for this judicial review is that it enables a court to resolve conflicts between general condemnors on a rational basis.<sup>23</sup>

This Comment focuses exclusively upon state law. Section II provides examples of cases in which courts have determined the paramount public use and an example of a statute that incorporates judicial balancing of uses. Section III of this Comment presents paradigms for judicial review in eminent domain proceedings between general condemnors acting in the roles of condemnor and condemnee, and discusses factors that support judicial balancing of uses. Section IV concludes by recommending that courts adopt the paramount public use doctrine.

## II. EMINENT DOMAIN LAW AND THE STATUS OF PARAMOUNT PUBLIC USE DOCTRINE

### A. *Eminent Domain: The Powers of General Condemnors*

Eminent domain is the power of the sovereign to take property for public use.<sup>24</sup> The common law vests sovereign powers exclusively

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<sup>18</sup> See *infra* notes 74-75 and accompanying text.

<sup>19</sup> Cf. *supra* note 7 and accompanying text.

<sup>20</sup> This terminology has not received uniform application. See *Bergen County Sewer Auth. v. Borough of Little Ferry*, 7 N.J. Super. 213, 218-19, 72 A.2d 886, 889 (App. Div. 1950); cf. *El Paso County v. City of El Paso*, 357 S.W.2d 783, 786 (Tex. Civ. App. 1962); see also *infra* notes 50-58 and accompanying text.

<sup>21</sup> See *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 348, 225 N.W. 164, 166 (1929) ("implied authority . . . considered" by court, under criterion that it be "evident that the [condemnor] cannot . . . reasonably carry on its business" without the taking); cf. *Weehawken*, 20 N.J. at 580, 120 A.2d at 597 ("Whatever may be the range of factual circumstances upon which [condemnor's] power may be 'necessarily implied' . . . [balancing of uses] becomes a subject of judicial indulgence to a greater or less[er] degree.") (emphasis added). But see *infra* note 47.

<sup>22</sup> A court's resolution of a conflict between uses results in "policy" formulation to the extent that the court's decision is not solely dictated by the language of the parties' grants of eminent domain.

<sup>23</sup> A court's decision is rational in the sense that it is based upon the greater public benefit, rather than upon an arbitrary rule. See *supra* text accompanying note 16.

<sup>24</sup> 1 NICHOLS, *supra* note 4, § 1.11, at 1-7.

in the federal and state legislatures.<sup>25</sup> A legislature's eminent domain is restricted only by constitutional limitations.<sup>26</sup> A state legislature may condemn property directly by special legislation.<sup>27</sup> Alternatively, a legislature may grant eminent domain to lesser entities.<sup>28</sup> These entities include state agencies, public corporations such as counties and municipalities, and privately owned, public service corporations, such as utilities.<sup>29</sup> Both constitutional limits and the terms of the grant restrict the eminent domain of lesser entities.<sup>30</sup>

Legislatures empower some state agencies to take property on the legislature's behalf and to exercise full eminent domain for a specific, statutory purpose.<sup>31</sup> A general condemnor, in contrast, has limited eminent domain under a general statutory grant of authority.<sup>32</sup> A general condemnor may take private property for its own use, to support its public duties,<sup>33</sup> but is limited in its ability to take public property.<sup>34</sup>

Historically, the "prior public use" rule has prevented general condemnors from taking public property.<sup>35</sup> This common-law rule

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<sup>25</sup> 26 AM. JUR. 2D *Eminent Domain* § 5 (1966). This Comment considers only the exercise of eminent domain within state government. The principles of paramount public use doctrine should be equally applicable at the federal level. *But see* Ball, *supra* note 3, at 37, 40-43 (treating federal government as a single, coherent entity, governed by a clear hierarchy of agency authorities).

<sup>26</sup> *See* 26 AM. JUR. 2D *Eminent Domain* §§ 5, 7 (1966).

<sup>27</sup> *See id.* § 5.

<sup>28</sup> *Id.*

<sup>29</sup> *See, e.g.*, 11 E. MCQUILLIN, *supra* note 9, § 32.12, at 260; 1 NICHOLS, *supra* note 4, § 1.141[4], at 1-41.

<sup>30</sup> *See* 26 AM. JUR. 2D *Eminent Domain* §§ 7, 10, 19 (1966).

<sup>31</sup> *See* Hiland v. Ives, 154 Conn. 683, 686-88, 228 A.2d 502, 504 (1967); *cf.* United States v. Carmack, 329 U.S. 230, 243 n.13 (1946).

<sup>32</sup> Eminent domain may be granted to a public corporation without express language, as an incident of the corporation's governmental power. *See* 1 NICHOLS, *supra* note 4, § 1.14[4], at 1-33. Eminent domain may be granted to a public service corporation either by express language of the corporate charter or by general act empowering all corporations serving a particular public need. *See* 26 AM. JUR. 2D *Eminent Domain* § 20 (1966). The general grant of authority enables a condemnor to take private property. Takings of property already in public use are discussed at *infra* notes 34-37 and accompanying text. *See generally* United States v. Carmack, 329 U.S. 230, 243 n.13 (1946) (comparing legislature's power to take for any public purpose with public service corporation's power to take, for its own use, only that property expressly identified or necessarily implied in grant of eminent domain).

<sup>33</sup> This power, however, does not permit a general condemnor to take for a solely private purpose. *City of Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 428, 107 P. 199, 201-02 (1910).

<sup>34</sup> 1 NICHOLS, *supra* note 4, § 2.2; 11 E. MCQUILLIN, *supra* note 9, § 32.67, at 402-03.

<sup>35</sup> *Florida E. Coast Ry. v. City of Miami*, 321 So. 2d 545, 547 (Fla. 1975); *see* *City of New Haven v. Town of East Haven*, 35 Conn. Supp. 157, 164-65, 402 A.2d 345, 349-50 (Super. Ct. 1977); *Vermont Hydro-Elec. Corp. v. Dunn*, 95 Vt. 144, 149, 112 A. 223, 225 (1921). Purposes of the prior public use rule are to prevent "the most absurd result[]" of multiple takings and

permits a general condemnor to take public property only by specific legislative direction.<sup>36</sup> The legislative intent may be in express language of a statute, or be "necessarily implied" by statutory language.<sup>37</sup> Under the prior public use rule, a suit to condemn public property thus involves an exercise in statutory interpretation.<sup>38</sup> Statutory interpretation is a traditional function of the judiciary.<sup>39</sup>

Some courts have argued that the search for legislative intent can proceed beyond the statutory language that enables a condemnor to exercise eminent domain.<sup>40</sup> These courts would find legislative intent necessarily implied in *facts* supporting a condemnor's need for specific property.<sup>41</sup> The facts must arise from circumstances beyond a condemnor's control, and must prevent the condemnor from performing its public duties unless it takes the property.<sup>42</sup> Necessarily-

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re-takings of the same property, *Denver Power & Irrigation Co. v. Denver & Rio Grande R.R.*, 30 Colo. 204, 212-13, 69 P. 568, 571 (1902); and to avoid the impropriety of the state's nullifying its own prior dedication of property to public use, without specific consideration of the superseding public use. *Board of Educ. v. Pace College*, 27 A.D.2d 87, 89-90, 276 N.Y.S.2d 162, 165 (1966).

<sup>36</sup> A legislature may grant either power to take public property generally, or power to take the specific property contested. See 1 NICHOLS, *supra* note 4, § 2.2, at 2-58. There are also exceptions to the prior public use rule that permit taking an easement for a "consistent public use," that is, one that will not destroy the prior use, *id.* § 2.2[8], at 2-95 to 2-98; and that permit taking a portion of public property that is not in actual public use. *Bergen County Sewer Auth. v. Borough of Little Ferry*, 7 N.J. Super. 213, 220, 72 A.2d 886, 889 (App. Div. 1950) (no basis to deny taking of municipally owned property that is unoccupied); see *Florida E. Coast Ry.*, 321 So. 2d at 548-49 (property serving a function that is "utilitarian in furtherance of the public use" for which a condemnee is authorized to exercise eminent domain may not be taken by another general condemnor); *Vermont Hydro-Elec. Corp. v. Dunn*, 95 Vt. 144, 150, 112 A. 223, 226 (1921) (property held in reasonable expectation of future needs is in bona fide public use).

<sup>37</sup> 1 NICHOLS, *supra* note 4, § 2.2, at 2-57 to 2-58.

<sup>38</sup> *City of New Haven v. Town of East Haven*, 35 Conn. Supp. 157, 164-65, 402 A.2d 345, 349-50 (Super. Ct. 1977).

<sup>39</sup> 73 AM. JUR. 2D *Statutes* § 142 (1974).

<sup>40</sup> See, e.g., *Louisiana Power and Light Co. v. City of Houma*, 229 So. 2d 202, 207 (La. Ct. App. 1969) (authority implied in fact only if clearly inferred from nature of the condemnor's use, if condemnor's charter will be defeated without it, and if necessity arises from condemnor's basic function, over which condemnor has no control). There is authority that grants of eminent domain should be strictly construed against a condemnor. *Id.*; 26 AM. JUR. 2D *Eminent Domain* § 18 (1966). This authority is probably directed to takings of private property rights. See *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 318, 31 So. 2d 483, 487 (1947). It is not clear that there is an analogous policy that would mandate strict statutory construction in proceedings to condemn public property. But see *City of Torrington v. Coles*, 155 Conn. 199, 201, 230 A.2d 550, 551 (1967) (citing maxim of strict construction without distinguishing between private and public property).

<sup>41</sup> *Pennsylvania R.R.'s Appeal*, 93 Pa. 150, 159 (1880) (finding no such necessity implied in fact because the condemnor had an option to condemn other, privately owned property as an alternative to taking public property).

<sup>42</sup> *Id.*; see also *Denver Power & Irrigation Co. v. Denver & Rio Grande R.R.*, 30 Colo. 204,

implied-in-fact legislative intent is a gloss on the prior public use rule.<sup>43</sup> A court employing this gloss performs the somewhat "active" judicial function of inferring legislative intent from a condemnor's necessity.<sup>44</sup> The court need not, however, make an overt policy determination involving general condemnors in the roles of both condemnor and condemnee.<sup>45</sup>

### *B. Status of the Paramount Public Use Doctrine*

Some courts have recognized an exception to the prior public use rule, if a general condemnor demonstrates that it has a paramount public use.<sup>46</sup> The paramount public use doctrine requires a court to balance the needs of two general condemnors for specific property, and to determine which use would produce the greater public benefit.<sup>47</sup> For example, a city's street department may seek to take

211, 69 P. 568, 570 (1902); *Louisiana Power and Light Co. v. City of Houma*, 229 So. 2d 202, 207 (La. Ct. App. 1969).

<sup>43</sup> A court applying this gloss looks beyond the statutory language of a condemnor's public charter to divine legislative "intent" in the facts of the case. Compare *City of New Haven v. Town of East Haven*, 35 Conn. Supp. 157, 164-65, 402 A.2d 345, 349-50 (Super. Ct. 1977) (treating legislative intent as a question of law, and regarding the only factual issue to be whether condemnee has a valid public use) with *supra* note 42 (cases seeking condemnor's authority from legislative intent implied in fact).

<sup>44</sup> The role is "active" to the extent that a court is required to go beyond its mechanical function under the pure prior public use rule. See *supra* notes 37-39 and accompanying text.

<sup>45</sup> The court does not balance the policies supporting both parties' uses because its focus is upon the facts of condemnor's necessity, and condemnee's facts are considered only to establish a valid, inconsistent, prior public use. See *supra* notes 36, 42.

<sup>46</sup> *Bergen County Sewer Auth. v. Borough of Little Ferry*, 7 N.J. Super. 213, 218-19, 72 A.2d 886, 889 (App. Div. 1950) (dictum, quoting 2 J. LEWIS, *supra* note 17, § 440); see also *Louisiana Power and Light Co. v. City of Houma*, 229 So. 2d 202, 211 (La. Ct. App. 1969) (dictum in civil law jurisdiction recognizing exception to prior public use rule as a "facet of the 'implied necessity doctrine'"); *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 273, 225 A.2d 130, 137 (1966) ("comparative evaluation of two public uses . . . to determine which should prevail as the paramount use" not undertaken because condemnee had no eminent domain, and therefore no valid prior public use); *Sabine & E. Texas Ry. v. Gulf & Interstate Ry.*, 92 Tex. 162, 166, 168, 46 S.W. 784, 786-87 (1898) (not reaching question whether paramount use is to be determined from condemnor's necessity or from balance of competing uses, but indicating that "importance to the public" is criterion for decision); 1 NICHOLS, *supra* note 4, § 2.2[3]; R. Manwaring, *The Paramount Public Use Doctrine* 1, 4-5 (Dec. 2, 1985) (unpublished report No. 236) (file of Professor Zygmunt Plater, Boston College Law School).

<sup>47</sup> See *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 580, 120 A.2d 593, 597 (1956).

Whatever may be the range of factual circumstances upon which the power [to condemn a public use] may be "necessarily implied," it is apparent that a comparative evaluation of the proposed and existing use[s] in terms of public benefit becomes a subject of judicial indulgence to a greater or less[er] degree.

*Id.* The *Weehawken* court also quoted language from 2 J. LEWIS, *supra* note 17, § 440, at 796, implicating a balancing of the condemnor's and condemnee's uses. See *infra* note 64. In

property already used by the city's school or park commission,<sup>48</sup> even if the present public user acquired the property by eminent domain. Balancing the necessity and benefit of two general condemnor's uses is an active judicial function.<sup>49</sup>

Courts have recognized the equivalent of a paramount public use exception for at least a century.<sup>50</sup> They have not, however, adopted a consistent doctrine or terminology to describe it.<sup>51</sup> In addition to "paramount public use,"<sup>52</sup> opinions have employed terms including "public exigency" and "overwhelming necessities,"<sup>53</sup> "reasonable public necessity,"<sup>54</sup> "public benefit" and "reasonable necessity,"<sup>55</sup> "critical need,"<sup>56</sup> "more necessary public use,"<sup>57</sup> and "higher use."<sup>58</sup>

the original treatise, this balancing was confined to cases where the condemnor's use was consistent with the existing use; if the prior public use would be destroyed, then a general condemnor was barred from taking. 2 J. LEWIS, *supra* note 17, § 440, at 796-98. Courts quoting from the treatise, however, have ignored the "consistent use" limitation and discussed the language as a general test for the paramount public use. *See Bergen County*, 7 N.J. Super. at 218-19, 72 A.2d at 889; *see also* *State Highway Comm'n v. City of Elizabeth*, 102 N.J. Eq. 221, 224, 140 A. 335, 336 (1928); *City of Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 430-31, 107 P. 199, 202 (1910).

<sup>48</sup> Such takings appear to arise frequently, although they are usually resolved by means other than judicial balancing. *See, e.g.*, *City of Torrington v. Coles*, 155 Conn. 199, 230 A.2d 550 (1967) (taking of park property); *County of Cook v. City of Chicago*, 84 Ill. App.2d 301, 228 N.E.2d 183 (1967) (taking of school); *City of Wichita v. Unified School Dist. No. 259*, 201 Kan. 110, 439 P.2d 162 (1968) (taking of school); *Town of Brookline v. Metropolitan Dist. Comm'n*, 357 Mass. 435, 258 N.E.2d 284 (1970) (taking of park property).

<sup>49</sup> A court is "active" in the sense that it weighs arguments advanced by *both* parties without greater deference to either, and reaches an independent decision on the merits without a legislative definition of priorities. *Compare* text accompanying *supra* notes 39, 44 with *infra* note 181.

<sup>50</sup> *See* *Pennsylvania R.R.'s Appeal*, 93 Pa. 150, 159 (1880); *Sabine & E. Texas Ry. v. Gulf & Interstate Ry.*, 92 Tex. 162, 166, 168, 46 S.W. 784, 786-87 (1898).

<sup>51</sup> The terminology is further confused because some courts have employed "paramount public use" in discussing takings of *private* property. *E.g.*, *Treuting v. Bridge and Park Comm'n*, 199 So. 2d 627, 634 (Miss. 1967). If the primary purpose for taking private property is to achieve a public benefit, then this purpose is sometimes said to be "paramount," and the taking may proceed even if some private benefit results incidentally. *Id.* The usage described is quite separate from the paramount public use doctrine discussed in this Comment.

<sup>52</sup> *Bergen County Sewer Auth. v. Borough of Little Ferry*, 7 N.J. Super. 213, 218-19, 72 A.2d 886, 889 (App. Div. 1950); *El Paso County v. City of El Paso*, 357 S.W.2d 783, 786 (Tex. Civ. App. 1962).

<sup>53</sup> *Denver Power & Irrigation Co. v. Denver & Rio Grande R.R.*, 30 Colo. 204, 210-12, 69 P. 568, 570-71 (1902).

<sup>54</sup> *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 351, 225 N.W. 164, 167 (1929).

<sup>55</sup> *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 580, 120 A.2d 593, 597 (1956).

<sup>56</sup> *City of Buffalo v. Iroquois Gas Corp.*, 70 Misc. 2d 25, 26, 332 N.Y.S.2d 925, 927 (Sup. Ct. 1972).

<sup>57</sup> *Woodland School Dist. v. Woodland Cemetery Ass'n*, 174 Cal. App. 2d 243, 245-46, 344 P.2d 326, 327 (1959).

<sup>58</sup> *City of Mesa v. Salt River Project Agric. Improvement and Power Dist.*, 92 Ariz. 91,



The confusion of terminology has resulted from a tension in the judicial balancing role.<sup>59</sup> A court may wish to give equal consideration to the public necessities served by both a condemnor and a public entity sued as a condemnee.<sup>60</sup> Opposing this balancing principle is a court's reluctance to intrude upon the legislative policy-making function.<sup>61</sup> To avoid an overt policy determination, a court may couch its opinion in terms of a search for legislative intent implied in fact.<sup>62</sup> Courts adopting a search for legislative intent have required standards of "absolute"<sup>63</sup> or "reasonable"<sup>64</sup> necessity implied in fact to support a taking of public property. Nevertheless, a court deciding under the rubric of necessity implied in fact may actually be performing a balance of public uses.<sup>65</sup> For example, judicial balancing is evident in a court's even-handed treatment of both parties' claims, even if the court formally clings to a search for legislative intent.<sup>66</sup>

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104, 373 P.2d 722, 731 (1962) (quoting *City of Tucson v. Tucson Gas, Elec. Light & Power Co.*, 152 F.2d 552, 555 (9th Cir. 1945)).

<sup>59</sup> See *supra* note 47 (court undertaking judicial balancing role while still clinging to putative search for implied-in-fact legislative intent).

<sup>60</sup> Equal consideration might help to ensure deciding in favor of the use that best serves the public necessity at the contested site, and to guarantee fairness to the public served by each use. See generally Payne, *Intergovernmental Condemnation as a Problem in Public Finance*, 61 TEX. L. REV. 949, 972-75 (1983) (drawing analogy between public burdened by loss of condemned use, and local citizens burdened by disproportionate taxation).

<sup>61</sup> See *State ex rel. Northwestern Elec. Co. v. Superior Court*, 28 Wash. 2d 476, 486, 183 P.2d 802, 808 (1947) (court refused to examine condemnor's determination of necessity absent fraudulent, arbitrary, or capricious action). Judicial reluctance to interfere with a legislative function stems from the separation of powers doctrine. See *infra* notes 67-68 and accompanying text.

<sup>62</sup> See *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 348-52, 225 N.W. 164, 166-67 (1929). "[A general condemnor] may be held to have implied authority to condemn [a prior public use if condemnor] cannot otherwise reasonably carry on its business and exercise its franchise powers." *Id.* at 348, 225 N.W. at 166.

<sup>63</sup> See *id.*; *City of Shakopee v. Clark*, 295 N.W.2d 495, 500 (Minn. 1980); *Pennsylvania R.R.'s Appeal*, 93 Pa. 150, 159 (1880); cf. *Louisville & Nashville R.R. v. Western Union Tel. Co.*, 195 Ala. 124, 134, 137-38, 71 So. 118, 122-24 (1915) (embracing "actual" necessity standard).

<sup>64</sup> See *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 580, 120 A.2d 593, 597 (1956); *Bergen County Sewer Auth. v. Borough of Little Ferry*, 7 N.J. Super. 213, 218-19, 72 A.2d 886, 889 (App. Div. 1950). See generally 2 J. LEWIS, *supra* note 17, § 440, at 796. Lewis defines the test for a general condemnor's necessity to take public property in the alternative: "there [is] a reasonable necessity for the taking where the public interests would be better [served thereby, or where the advantages to the condemnor will largely exceed the disadvantages to the condemnee." *Id.* Both the terms "better served" and "largely exceed" appear to require a balancing of the condemnor's and condemnee's uses, on the facts of each case. Thus, judicial balancing of uses appears to be a necessary concomitant of the standard of review preferred by this century-old treatise. See *id.*

<sup>65</sup> See *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 348-51, 225 N.W. 164, 166-67 (1929).

<sup>66</sup> See *id.*; see *infra* notes 92-99 and accompanying text; *Weehawken*, 20 N.J. at 577-78,

Courts traditionally have considered the determination of necessity for taking property a policy-making function, reserved to a legislature.<sup>67</sup> When reviewing a taking of private property, a court will not question a legislatively authorized condemnor's determination of necessity for the taking.<sup>68</sup> In a contest between general condemnors, however, each party has a grant of legislative policy-making authority.<sup>69</sup> In such a case, traditional doctrine does not indicate a proper judicial role.<sup>70</sup> Courts sometimes have attempted to resolve the competing claims of general condemnors without assuming a legislative function by inferring legislative intent from implied-in-fact public necessity.<sup>71</sup>

Courts traditionally have deferred to legislative findings of fact, as well as to legislative policy-making prerogatives.<sup>72</sup> In a condemnation proceeding decided by a search for legislative intent to take public property, a court may permit a condemnor's factual allegations to go unchallenged.<sup>73</sup> If a court performs a balance of public uses,

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582-87, 120 A.2d at 595, 598-600. "[I]f the power to condemn a public use may be 'necessarily implied' from the statutory authority, it may be exercised." *Id.* at 580, 120 A.2d at 597.

<sup>67</sup> 1A NICHOLS, *supra* note 4, § 4.11, at 4-174.

<sup>68</sup> *See id.* § 4.11, at 4-174, § 4.11[1], at 4-198.

<sup>69</sup> That is, both have grants of eminent domain, with the accompanying right to make independent determinations of necessity in selecting property to be taken. *See id.*

<sup>70</sup> In effect, a legislature, through its quasi-legislative delegate entities, is on both sides of the question. Even an executive agency or a public service corporation must perform a legislative function when it takes property because eminent domain authority lies only in legislatures. 26 AM. JUR. 2D *Eminent Domain* § 5 (1966). Thus, the conflicting decisions of general condemnors may be likened to a conflict in statutory provisions: a fit subject for judicial resolution. *See* 73 AM. JUR. 2D *Statutes* § 142 (1974) (duty of courts to construe laws); *id.* § 258 (duty of courts to resolve ambiguity so as to achieve most beneficial outcome).

<sup>71</sup> *See* Minnesota Power & Light Co. v. State, 177 Minn. 343, 348-52, 225 N.W. 164, 166-67 (1929); *cf. infra* notes 181, 197 and accompanying text.

<sup>72</sup> *See* 16 AM. JUR. 2D *Constitutional Law* § 340 (1979) (determination of facts is ancillary to legislative function, and may be delegated); *see also id.* § 327 (legislative recital of facts determined by investigation does not invade judicial function); *id.* § 315 (disposition of public lands is executive function, not subject to judicial review). In addition to a court's deference to a legislative finding, there is also the matter of deference to any official finding of fact, irrespective of what branch of government it originates from. Thus, courts grant a rebuttable presumption of correctness to facts found by lower courts or by court-appointed referees. 5 AM. JUR. 2D *Appeal and Error* § 704 (1962). Courts also utilize a deferential standard in reviewing facts found by administrative agencies. 2 AM. JUR. 2D *Administrative Law* § 618 (1962). In takings of private property, courts withhold review of specific factual determinations such as the amount and location of property to be taken, in addition to the more general policy determination of whether any taking is necessary. 1A NICHOLS, *supra* note 4, § 4.11, at 4-190, 4-192.

<sup>73</sup> For example, a court may accept a condemnor's finding that the condemnor can reasonably conduct its public duties only by taking the condemnee's property, and conclude that this implied-in-fact necessity arises from circumstances beyond the condemnor's control. *See, e.g.,* City of Denver v. Board of Comm'rs, 113 Colo. 150, 162-64, 156 P.2d 101, 106 (1945) (deferring

however, the court must give equal weight to the factual allegations of the public entity in the role of condemnee.<sup>74</sup> If the parties' "facts" conflict, a court may abandon deference in favor of adjudicating the conflict.<sup>75</sup>

Judicial balancing of uses may thus be characterized by a probing analysis of both parties' facts.<sup>76</sup> This probing factual analysis, and the even-handed treatment of both parties' necessity claims, signal that a court is effectively balancing public uses.<sup>77</sup> If a court phrases its opinion in terms of implied-in-fact necessity, then these signals may be the best means to discern the actual motivation behind a decision.<sup>78</sup>

### *C. A Comparison Between the Prior Public Use Rule and Judicial Balancing of Uses*

Some courts resolve property disputes arising between general condemnors by applying a mechanical rule, while other courts con-

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to factual findings of home rule city taking for city's own use; judicial notice given to facts that might support condemnor city's necessity); *State v. Christopher*, 284 Minn. 233, 235-36, 239, 170 N.W.2d 95, 97, 99 (1969) (deferring to factual findings of agency taking on behalf of legislature).

<sup>74</sup> The condemnee's findings of fact are now before the court, as well as the condemnor's findings. Because both parties are supported by equal grants of legislative discretion, there is no reason for the court to favor one party's findings over the other party's. See *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 577-78, 582-87, 120 A.2d 593, 595, 580-600 (1956) (judicial balancing of uses without deference to either party's factual allegations).

<sup>75</sup> A court cannot simultaneously accept two conflicting statements of fact, so the court must abandon deference to at least one party's statement to try a case. A conflict between general condemnors presents a distinctly different problem, in this respect, than a taking of private property. If a condemnor takes private property, the necessity for the taking need not be reviewable, although due process entitles the owner to a trial of the "adjudicative" fact of the property's value. See 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.04 (1958). In a contest between two general condemnors, both the "legislative" issue of necessity and the supporting factual issues are in dispute, and there is no clear legislative intent to provide a resolution. Under these circumstances, a full trial of all pertinent factual issues appears to be the only rational means to determine which party actually possesses the greater necessity for the contested property. See *infra* notes 98, 192-94 and accompanying text.

<sup>76</sup> A court may be observed to conduct this factual analysis without deference to either party. See, e.g., *infra* notes 109-15 and accompanying text.

<sup>77</sup> Balancing is evident from these signals, if only because a court would have no reason to set out a condemnee's factual circumstances in its opinion if the decision was based solely upon legal factors, or upon the condemnor's factual circumstances. Conversely, there is often little discussion of a condemnee's factual circumstances in cases where the condemnor takes on behalf of a sovereign. See, e.g., *City of Denver v. Board of Comm'rs*, 113 Colo. 150, 165-69, 156 P.2d 101, 107-09 (1945); *Hiland v. Ives*, 154 Conn. 683, 684-85, 694, 228 A.2d 502, 503, 507 (1967); *State v. Christopher*, 284 Minn. 233, 235-36, 170 N.W.2d 95, 97 (1969).

<sup>78</sup> See *infra* notes 92-97, 109-15 and accompanying text.

duct a balancing of uses.<sup>79</sup> The Connecticut case of *Canzonetti v. City of New Britain*<sup>80</sup> exemplifies mechanical application of the prior public use rule.<sup>81</sup> In *Canzonetti*, the Connecticut Supreme Court considered a city's attempt to condemn the property of a school board for a city road extension.<sup>82</sup> The court determined that both parties held general grants of eminent domain from the state legislature.<sup>83</sup> There was nothing in the city charter authorizing condemnation of school property, either expressly or by necessary implication.<sup>84</sup>

The *Canzonetti* court decided for the condemnee school board, without considering what options were available to either party.<sup>85</sup> Reasoning that the taking presented a non-justiciable policy issue,<sup>86</sup> the court held that the city had to obtain express legislative authorization to condemn school property.<sup>87</sup>

In contrast with *Canzonetti*, the *Minnesota Power & Light Co. v. State*<sup>88</sup> decision reflects a judicial balancing of uses.<sup>89</sup> In *Minnesota Power*, the Minnesota Supreme Court considered a utility's suit to condemn an easement through a state park to construct a power line.<sup>90</sup> The court concluded that neither the language in the utility's eminent domain statute nor its implication showed a legislative intent to authorize condemnation of park property.<sup>91</sup>

The *Minnesota Power* court then turned to a balancing of uses, but characterized the analysis as a search for legislative intent implied in fact.<sup>92</sup> The court considered the cost and convenience benefits

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<sup>79</sup> Compare *infra* notes 83-87 and accompanying text with *infra* notes 92-97 and accompanying text.

<sup>80</sup> 147 Conn. 478, 162 A.2d 695 (1960).

<sup>81</sup> *Id.* at 482, 162 A.2d at 696.

<sup>82</sup> *Id.* at 480, 162 A.2d at 696. The school board sued for a declaration that its property could not be taken by the city. The trial court certified to the Connecticut Supreme Court the question whether the city could take without school board consent. *Id.* at 479, 162 A.2d at 695.

<sup>83</sup> See *id.* at 480-82, 162 A.2d at 696.

<sup>84</sup> *Id.* at 482, 162 A.2d at 696.

<sup>85</sup> *Id.* at 480, 482, 162 A.2d at 696-97.

<sup>86</sup> *Id.* at 482, 162 A.2d at 696.

<sup>87</sup> *Id.*, 162 A.2d at 697.

<sup>88</sup> 177 Minn. 343, 225 N.W. 164 (1929).

<sup>89</sup> *Id.* at 348-51, 225 N.W. at 166-67.

<sup>90</sup> *Id.* at 343, 225 N.W. at 164.

<sup>91</sup> *Id.* at 348-49, 225 N.W. at 166. The court also concluded that the park was in actual prior public use, *id.* at 346, 225 N.W. at 165; and that the utility's use was not consistent with the prior park use, *id.* at 350-51, 225 N.W. at 167.

<sup>92</sup> The court indicated that its standard of evaluation was "the rule that a corporation has implied power to condemn [public property], because otherwise it could not reasonably carry on its business and exercise its franchise powers." *Id.* at 349, 225 N.W. at 166.

that the utility would achieve from the taking.<sup>93</sup> The court also considered the aesthetic and ecological impacts on the park.<sup>94</sup> These impacts would include defoliation of the strip of land in question, erection of towers and support cables, and continuing intrusions for maintenance.<sup>95</sup> The court also considered the alternatives available to each party: the utility already possessed five easements through the park including one in the direction of the proposed taking,<sup>96</sup> while the park faced a continuing series of encroachments that could result in final destruction of its public value.<sup>97</sup>

Based upon its balance of uses, the court reversed a trial court finding that public necessity required the taking.<sup>98</sup> The *Minnesota Power* court concluded that the facts did not support the utility's claim of necessarily implied authority.<sup>99</sup> Thus, the court held for the condemnee park.<sup>100</sup>

The *Township of Weehawken v. Erie Railroad*<sup>101</sup> case demonstrates a more overt use of judicial balancing than the *Minnesota Power* decision.<sup>102</sup> In *Weehawken*, the New Jersey Supreme Court partially overturned a town's taking of railroad company land to construct a recreation facility.<sup>103</sup> Like the *Minnesota Power* court, the *Weehawken* court characterized its analysis as a search for legislative intent in the factual circumstances.<sup>104</sup> The *Weehawken* court,

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 350-51, 225 N.W. at 167.

<sup>95</sup> *Id.* at 350, 225 N.W. at 167.

<sup>96</sup> *Id.* at 349, 225 N.W. at 166.

<sup>97</sup> *Id.* at 351, 225 N.W. at 167.

<sup>98</sup> *Id.* at 351-52, 225 N.W. at 167. *Minnesota Power* thus represents a clear break with deference to the condemnor's finding of implied-in-fact necessity, as well as a reversal of the trial court's finding of necessity for the taking.

<sup>99</sup> *Id.* at 352, 225 N.W. at 167. The court also stated that necessarily implied authority ("public necessity") would be required to support a taking, even if the utility's use was held to be consistent with park use. This dictum was not material to the court's decision, however, as the court held that the utility's use was inconsistent with the prior use and unsupported by public necessity. *Id.* at 351-52, 225 N.W. at 167.

<sup>100</sup> *Id.*

<sup>101</sup> 20 N.J. 572, 120 A.2d 593 (1956).

<sup>102</sup> *Id.* at 576-78, 582-87, 120 A.2d at 595, 597-600.

<sup>103</sup> *Id.* at 575, 586, 120 A.2d at 594, 600. Both the town and the railroad company were general condemnors. *See id.* at 578-79, 120 A.2d at 596. The court found at the outset that a portion of the contested property was in actual prior public use because the condemnee railroad had a bona fide intent to utilize it to construct a public facility. *Id.* at 581-83, 120 A.2d at 597-98. The court further found that the condemnor township's use was not consistent with the condemnee's use unless modified according to the partition of the property engineered by the court. *See id.* at 586, 120 A.2d at 600.

<sup>104</sup> *Id.* at 580, 120 A.2d at 597 (discussing "the range of factual circumstances upon which [eminent domain] may be 'necessarily implied'").

however, admitted frankly that its analysis included a judicial balancing of the competing uses.<sup>105</sup>

The *Weehawken* court imposed a burden of proving "reasonable necessity" for the taking upon the condemnor town.<sup>106</sup> This reasonable necessity standard could be met if a judicial balance showed that the public would be better served by a taking, or showed that the advantages to the condemnor outweighed the disadvantages to the public entity in the role of condemnee.<sup>107</sup> In applying its balance, the court considered equitable, as well as factual arguments, and weighed the alternatives available to each party.<sup>108</sup>

In presenting the arguments, the town of Weehawken claimed public necessity for its use because of a recent loss of town property.<sup>109</sup> The town also argued that only a small minority of the population could utilize a planned railroad facility, while a town facility would benefit the public at large.<sup>110</sup> A further factor was that another entity would fund the town's project, providing additional benefit to the town's population.<sup>111</sup>

The railroad argued that the contested site had great functional convenience for the planned railroad facility, and offered only neutral value for town purposes.<sup>112</sup> Further, a motor freight company essential to the railroad's plan preferred the contested site.<sup>113</sup> Only one other site of the type needed by the railroad was available, and that site was in another municipality.<sup>114</sup> Although the property was not yet in public use, the railroad established that it had a bona fide intent to construct its own public facility as soon as the litigation was concluded.<sup>115</sup>

The railroad complemented its factual arguments with a number of equitable arguments.<sup>116</sup> One argument was that the railroad's

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<sup>105</sup> *Id.* (concluding that a "comparative evaluation" of the competing public uses is a fit subject for judicial review); see *supra* note 47.

<sup>106</sup> *Weehawken*, 20 N.J. at 580, 120 A.2d at 597.

<sup>107</sup> *Id.*; see *supra* note 64.

<sup>108</sup> *Weehawken*, 20 N.J. at 576-78, 582-87, 120 A.2d at 595, 598-600.

<sup>109</sup> *Id.* at 577, 120 A.2d at 595. In addition to the town's need for a recreation facility, the town presented testimony that it required a parking area. The court considered the nature of each town use, insofar as it related to the suitability of the site, but did not further probe the town's allegation of necessity. *Id.* at 586, 120 A.2d at 600.

<sup>110</sup> See *id.* at 582, 120 A.2d at 598.

<sup>111</sup> *Id.* at 577, 120 A.2d at 595.

<sup>112</sup> *Id.* at 584-85, 120 A.2d at 599.

<sup>113</sup> *Id.* at 584, 120 A.2d at 599.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 583, 120 A.2d at 598.

<sup>116</sup> *Id.* at 577-78, 582-87, 120 A.2d at 595, 598-600; cf. *infra* note 190.

plans had begun before the town publicly announced its project, and the town had not been diligent in providing notification.<sup>117</sup> Further, when notified, the railroad had made good-faith efforts toward an extrajudicial settlement.<sup>118</sup> The railroad's efforts had included an offer to grant a portion of the contested property for town use.<sup>119</sup> Also, the railroad had demonstrated continuing good faith by renewing its offer during litigation.<sup>120</sup>

The *Weehawken* court held that the facts did not support implying legislative intent that the town take the entire property sought.<sup>121</sup> In reaching its finding, the court concentrated on the alternative actions available to each party.<sup>122</sup> The court noted that the town had greater flexibility in choosing its site,<sup>123</sup> and that the railroad would be placed at a competitive disadvantage if forced to abandon its terminal project.<sup>124</sup> The court ultimately wrought an accommodation between the parties, severing a portion of the contested property that the railroad admitted was not intended for public use.<sup>125</sup> The court employed an additional balance of uses to make its solution practical, permitting the town to take an easement of access to the parcel of property allocated to it.<sup>126</sup>

In *Village of Richmond Heights v. Board of County Commissioners*,<sup>127</sup> an Ohio appellate court specifically rejected the paramount public use doctrine applied in *Weehawken*.<sup>128</sup> Interestingly, the *Richmond Heights* court proceeded to perform a balance of uses, consid-

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<sup>117</sup> *Weehawken*, 20 N.J. at 577, 584, 120 A.2d at 595, 599.

<sup>118</sup> *Id.* at 585-86, 120 A.2d at 599-600.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See id.* The court thus reversed the finding below that the condemnee's property was not in actual public use. *Id.* at 578-79, 120 A.2d at 596; *cf. supra* note 98.

<sup>122</sup> *Weehawken*, 20 N.J. at 585, 120 A.2d at 599.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 584, 120 A.2d at 599.

<sup>125</sup> *Id.* at 585-87, 120 A.2d at 599-600. The court's result could be interpreted as an application of the prior public use rule (to the property retained by the railroad), and the "no actual public use" or the "consistent use" exception to the portion severed for town use. *See Village of Richmond Heights v. Board of County Comm'rs*, 112 Ohio App. 272, 286-87, 166 N.E.2d 143, 153-54 (1960) (Guernsey, J., dissenting). The court's attention to factual detail, to the parties' equities, and to the standard of reasonable necessity, however, all belie that interpretation. *See Weehawken*, 20 N.J. at 576-78, 582-87, 120 A.2d at 595, 597-600.

<sup>126</sup> This refinement of the court's decision to sever the parcel required the court to conduct a balancing test to determine whether the limited taking of the easement would create a benefit to the town outweighing the detriment to the railroad. The court concluded that the town's benefit predominated for the easement property. *See Weehawken*, 20 N.J. at 585-87, 120 A.2d at 600.

<sup>127</sup> 112 Ohio App. 272, 166 N.E.2d 143 (1960).

<sup>128</sup> *Id.* at 282, 166 N.E.2d at 151.

ering factual and equitable arguments for both parties.<sup>129</sup> The court termed this analysis a "balance [of] relative conveniences of the parties."<sup>130</sup> The court indicated that it conducted its balance of uses only because the condemnee had sued in equity for an injunction against the taking.<sup>131</sup>

In *Richmond Heights*, the court considered a county's taking of village property for an airport expansion.<sup>132</sup> The county argued that the taking was supported by a long-standing master plan.<sup>133</sup> Additionally, the county argued that the village had acquired the contested property in bad faith, intending to block airport expansion.<sup>134</sup> The village had purchased the property immediately prior to the county's planned acquisition, and had no funding to support its plan to construct a recreation center.<sup>135</sup>

The village argued that it did have funding for another part of its project, a planned town hall.<sup>136</sup> The village had negotiated for a long period to purchase the property.<sup>137</sup> The village also argued that its property was most suitable and economical for the village's planned uses.<sup>138</sup>

The *Richmond Heights* court held that the condemnee village had shown a good-faith intention to construct a town hall but that the intention to construct a recreation center was not proven.<sup>139</sup> The court also held that other sites might be available for a recreation center, and that the major portion of the contested property was necessary for runway expansion.<sup>140</sup> The court's balance indicated that greater public benefit would result from use of this portion for a

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<sup>129</sup> *Id.* at 276-79, 166 N.E.2d at 147-49.

<sup>130</sup> *Id.* at 283, 166 N.E.2d at 151.

<sup>131</sup> *See id.* at 282-83, 166 N.E.2d at 151.

<sup>132</sup> *Id.* at 273, 166 N.E.2d at 146. Both parties were general condemnors. The condemnee village had sued in equity to enjoin the condemnor county's taking. The condemnee appealed from a trial court ruling that enjoined only a part of the taking. *Id.*, 166 N.E.2d at 145-46.

<sup>133</sup> *Id.* at 277, 166 N.E.2d at 148. The county also argued that it required the contested property to meet federal airport standards, and that the contested property was the only practical location for the county's proposed use. *Id.* at 276, 166 N.E.2d at 147.

<sup>134</sup> *Id.* at 275, 166 N.E.2d at 147. The county presented evidence that the village had purchased the property with full knowledge of the county's plans, and that the village had long opposed airport expansion. *Id.* at 276-79, 166 N.E.2d at 147-49.

<sup>135</sup> *Id.* at 277-79, 284, 166 N.E.2d at 148-49, 152.

<sup>136</sup> *Id.* at 276, 166 N.E.2d at 147.

<sup>137</sup> Financial constraints had delayed the village's actual purchase. *Id.* at 277-79, 166 N.E.2d at 148-49.

<sup>138</sup> *Id.* at 274-75, 166 N.E.2d at 146.

<sup>139</sup> *Id.* at 284, 166 N.E.2d at 152.

<sup>140</sup> *Id.*



runway than from its use as a recreation center.<sup>141</sup> Accordingly, the court enjoined the county from taking the town hall property, but refused to enjoin the county from taking the portion intended for the recreation center.<sup>142</sup>

Thus, the *Richmond Heights* court conducted its analysis as an equitable balance of conveniences, while the *Minnesota Power* and *Weehawken* courts utilized the device of a search for implied-in-fact legislative intent.<sup>143</sup> All three decisions contain signals of judicial balancing, but the courts evidently were uncomfortable with a formal adoption of a balance of uses.<sup>144</sup> Judicial discomfort in the balancing role can be removed by legislative guidance in the form of statutes that invoke judicial balancing.<sup>145</sup>

#### D. Statutory Incorporation of Judicial Balancing of Uses

California's statute on condemnation of public property, Article 7 of Eminent Domain Law,<sup>146</sup> codifies judicial balancing of uses under a system of stated priorities.<sup>147</sup> Although the statute does not expressly require judicial balancing, the statutory priorities are implemented through a series of rebuttable presumptions.<sup>148</sup> That the presumptions are rebuttable suggests a legislative intent to make a court consider the uses of both a condemnor and a public entity in the role of condemnee.<sup>149</sup> Further evidence of legislative endorse-

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<sup>141</sup> Pursuant to its equitable role, the court phrased this balance negatively, in terms of minimal harm, rather than in terms of maximal benefit. *See id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See supra* notes 92, 104, 130 and accompanying text.

<sup>144</sup> *See supra* notes 93-99, 109-24, 133-38 and accompanying text; *cf. supra* note 77 and accompanying text.

<sup>145</sup> There is no constitutional impediment to a legislature delegating the balancing function to a court. *See* 1A NICHOLS, *supra* note 4, § 4.11[4], at 4-262 to 4-263.

<sup>146</sup> Condemnation For More Necessary Public Use, CAL. CIV. PROC. CODE §§ 1240.610-1240.700 (West 1982).

<sup>147</sup> *Id.*; *cf. Dau, Problems in Condemnation of Property Devoted to Public Use*, 44 TEX. L. REV. 1517, 1525-26 (1966) (comparing statutes of other states). *But see* Matteoni, *The California Roadway—"A More Necessary Public Use,"* 20 HASTINGS L.J. 551, 568-70 (1969) (arguing for reduced judicial role through stronger legislative guidelines).

<sup>148</sup> CAL. CIV. PROC. CODE §§ 1240.640, 1240.660, 1240.670, 1240.680 (West 1982). The statute also provides a procedural framework for litigation, *id.* §§ 1240.610-1240.630, 1240.690, 1240.700, as well as an irrebuttable presumption in favor of use by a public entity as against use by a private entity. *Id.* § 1240.650.

<sup>149</sup> Further evidence of legislative intent to impose judicial balancing appears from the requirement that, once the condemnee's prior public use is established, the condemnor has the burden of proof that its use is more necessary than the condemnee's use. *Id.* §§ 1240.610, 1240.620. It would be futile to impose such a burden of proof on a condemnor unless a court had discretion to decide whether, in fact, the condemnor's use was more necessary than the condemnee's use.

ment of balancing appears in language that makes a condemnor's burden of proving that it has a "more necessary public use" subject to some of the presumptions.<sup>150</sup> This language makes sense only if a court is to make a determination on the facts of whether a condemnor has proved that its use is more necessary than a condemnee's prior public use.<sup>151</sup>

If a condemnor meets its burden of proving that it has a more necessary public use, then Article 7 provides a specific grant of legislative authority to condemn public property.<sup>152</sup> Under the "more necessary public use" criterion, the burden is upon a condemnor to prove that its use is more necessary than a condemnee's,<sup>153</sup> subject to the statutory presumptions.<sup>154</sup> For example, use by the state as against any other person,<sup>155</sup> and prior use by a local public entity as against any other local public entity,<sup>156</sup> are rebuttably presumed to be "more necessary uses."<sup>157</sup> Thus, judicial balancing can tip in favor of condemning a local prior public use, or even condemning property of the state itself, if there is sufficient proof of a condemnor's more necessary public use.<sup>158</sup> Conversely, a condemnee may resist a taking, even one made on the state's behalf, if the balance shows that the condemnee's use serves a greater public necessity.<sup>159</sup>

Article 7 indicates that two types of prior uses are presumed to be "the best and most necessary public use[s]."<sup>160</sup> One such type of use is use by a nonprofit organization that has irrevocably dedicated

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<sup>150</sup> *Id.* §§ 1240.640(c), 1240.660, 1240.670(b), 1240.680(b).

<sup>151</sup> *See id.*

<sup>152</sup> *Id.* § 1240.610.

<sup>153</sup> This burden of proof falls upon the condemnor only after the condemnee has established its "actual" prior public use. *Id.* § 1240.620. The statute also incorporates a common-law exception to the prior public use rule, permitting condemnation of a portion of the property to enable two "consistent" public uses of the same property. *See id.* § 1240.630. The court is given discretion to set terms and engineer conditions to assure continuity of consistent uses without interference between them. *Id.*

<sup>154</sup> *Id.* §§ 1240.640, 1240.660, 1240.670, 1240.680.

<sup>155</sup> *Id.* § 1240.640.

<sup>156</sup> *Id.* § 1240.660.

<sup>157</sup> Use by a public entity is irrebuttably presumed to be more necessary than either the same or a different use by a private entity. *Id.* § 1240.650. This presumption accords with common-law doctrine that public ownership of facilities provides greater public benefit than does private ownership of the same facilities. *City of Mesa v. Salt River Project Agric. Improvement and Power Dist.*, 92 Ariz. 91, 104, 373 P.2d 722, 731 (1962) (quoting *City of Tucson v. Tucson Gas, Elec. Light & Power Co.*, 152 F.2d 552, 555 (9th Cir. 1945)); *State ex rel. Northwestern Elec. Co. v. Superior Court*, 28 Wash. 2d 476, 484, 183 P.2d 802, 807 (1947); *City of Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 431-32, 107 P. 199, 203 (1910).

<sup>158</sup> CAL. CIV. PROC. CODE §§ 1240.640(b), 1240.660 (West 1982).

<sup>159</sup> *See id.* § 1240.640(a).

<sup>160</sup> *Id.* §§ 1240.670, 1240.680.

property to a nature preserve, open to public access.<sup>161</sup> The second type of best and most necessary use is for existing state, county, or city parks, and other enumerated public lands.<sup>162</sup> The presumption that these uses are best and most necessary affects a condemnor's burden of proof.<sup>163</sup> A condemnor must make an even stronger case to tip the judicial balance in favor of condemning one of the best and most necessary uses than to condemn one of the "more necessary" uses, by the state or by a prior-existing local public entity.<sup>164</sup>

Judicial balancing also is incorporated in Article 7 provisions for litigating conflicts between highway construction and existing parks or nature preserves.<sup>165</sup> For example, one clause indicates that determinations of the State Transportation Commission are not conclusive evidence that a highway use will be consistent with a non-profit nature preserve.<sup>166</sup> The statute thus relies upon judicial discretion to determine whether a highway taking of nature preserve property will be permitted.<sup>167</sup>

As with any statutory limitation upon sovereign power, the state can override Article 7 by enacting a new statute.<sup>168</sup> It is significant,

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<sup>161</sup> *Id.* § 1240.670(a).

<sup>162</sup> *Id.* § 1240.680(a). Included are state and local parks and recreation areas, wildlife management areas, national historic sites and state-registered landmarks, and ecological reserves. *Id.*

<sup>163</sup> *Id.* §§ 1240.670(b), 1240.680(b).

<sup>164</sup> Compare *id.* §§ 1240.670(a), 1240.680(a) ("best and most necessary public use") with *id.* §§ 1240.640(a), 1240.660 ("more necessary [public] use").

<sup>165</sup> *Id.* § 1240.690 (takings of private preserves or public parks for state highway construction); *id.* § 1240.700 (takings of public parks for local road construction). The fact that there is no provision for takings of private, nonprofit preserves for local road construction suggests that the legislature may have regarded such preserves as "more necessary" than local roads or public parks, and on a par with state highways. See *id.* § 1240.700(a).

<sup>166</sup> *Id.* § 1240.690(c) (West 1982 & Supp. 1989).

<sup>167</sup> See *id.* Such a degree of judicial discretion runs counter to common-law practice, which gives state agencies full legislative authority to take public property on a legislature's behalf. See *Hiland v. Ives*, 154 Conn. 683, 687-89, 228 A.2d 502, 504-05 (1967) (highway commissioner has discretion to take any property from general condemnor); *State Highway Comm'n v. City of Elizabeth*, 102 N.J. Eq. 221, 226-28, 140 A.2d 335, 337-38 (N.J. Ch. 1928) (highway commission can take any property of lesser entity); *State v. Christopher*, 284 Minn. 233, 238-39, 170 N.W.2d 95, 98-100 (1969) (court will not review highway commissioner's discretion in determining necessity for taking; distinguishing *Minnesota Power* as contest between two general condemnors rather than between a state and a general condemnor).

<sup>168</sup> California does have other statutes setting priorities for certain specific public uses. See, e.g., CAL. HEALTH & SAFETY CODE §§ 8134, 8560 (West 1970) (cemetery may not be taken for right of way); CAL. PUB. RES. CODE § 5006.2 (West 1984) (particular state forest may only be taken by legislature); CAL. PUB. RES. CODE § 8030 (West 1977) (certain parcels at boundary of national reservation may not be taken); CAL. PUB. UTIL. CODE § 21632 (West 1965 & Supp. 1989) (local airport may not be condemned by department of transportation without consent).

however, that California has chosen to rely upon judicial balancing to determine most conflicts respecting use of its public lands.<sup>169</sup> Under Article 7, even takings on the state's behalf may be subject to judicial review for public necessity.<sup>170</sup> This delegation of legislative authority bespeaks a high degree of confidence in judicial determination of the paramount public use.<sup>171</sup>

Judicial balancing of public uses has had some acceptance in both state common law and statutory law. Despite limited development of the doctrine and terminology, judicial balancing offers a rational mechanism for resolution of property use conflicts between general condemnors. Paradigms for judicial review illustrate the potential role of the paramount public use doctrine.

### III. PARADIGMS FOR JUDICIAL REVIEW AND PROPOSAL FOR ADOPTION OF PARAMOUNT PUBLIC USE DOCTRINE

#### A. *Paradigms for Judicial Review in Eminent Domain Proceedings Between General Condemnors*

The functions available to a court deciding a conflict of public uses may be clarified by the use of paradigms. Judicial roles span a continuum, from very deferential toward legislative intent,<sup>172</sup> to very active in developing common law.<sup>173</sup> Three simplified examples from this continuum are considered. The three paradigms posit a conflict between two general condemnors, one of which has the contested property in public use and therefore acts in the role of condemnee.<sup>174</sup> There is no statutory language establishing a hierarchy of public uses<sup>175</sup> or directing which party is to utilize the contested property.

In the first paradigm, the court is quite deferential to the legislature, viewing the separation of powers as a strong bar to judicial

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<sup>169</sup> See *supra* notes 149-51, 158-59 and accompanying text.

<sup>170</sup> See CAL. CIV. PROC. CODE §§ 1240.620, 1240.640(a), 1240.640(c) (West 1982).

<sup>171</sup> See *supra* note 167.

<sup>172</sup> See *Canzonetti v. City of New Britain*, 147 Conn. 478, 482, 162 A.2d 695, 696 (1960); see *supra* text accompanying note 86.

<sup>173</sup> See *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 580, 120 A.2d 593, 597 (1956); see *supra* text accompanying note 105.

<sup>174</sup> It is given that courts already have made findings that the condemnee's property is in actual prior public use, although this finding is discussed further in connection with the first paradigm. It is also given that each court has made a finding that the condemnor's use is inconsistent with the use exercised by the condemnee. See *supra* note 36.

<sup>175</sup> See *supra* text accompanying note 147.

policymaking.<sup>176</sup> The court examines the condemnor's legislative grant of eminent domain, determining whether authority to take the condemnee's property is expressed or necessarily implied in statutory language. The court does not examine the condemnee's grant of eminent domain, because in retaining its property, the condemnee is not proceeding to exercise that power. If the condemnor has authority to take public property, then the court approves the condemnor's taking.

If the statutory language contains no expression or necessary implication of legislative intent, then the court in the first paradigm is reluctant to find that the condemnor has authority implied in the facts. Implying authority from the condemnor's claim of necessity would involve the court in resolving the policy question of how strong the condemnor's need is. The court avoids the policy issue by finding for the condemnee, preserving the prior public use. The court gives consideration to neither the strength of the condemnee's necessity, nor the public value of the condemnee's use.

In the second paradigm, the court is slightly more willing to confront policy issues.<sup>177</sup> If authority to take the condemnee's prop-

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<sup>176</sup> See *City of Torrington v. Coles*, 155 Conn. 199, 203, 230 A.2d 550, 551 (1967) (city redevelopment authority's taking of city park commission property barred by prior public use rule); *Canzonetti*, 147 Conn. at 481-82, 162 A.2d at 696 (city taking of school board property barred by prior public use rule); *Vermont Hydro-Elec. Corp. v. Dunn*, 95 Vt. 144, 153, 112 A. 223, 227 (1921) (city taking of hydroelectric corporation's water rights, held in reasonable anticipation of future needs that pertain to public franchise, barred by prior public use rule); see also *Town of Brookline v. Metropolitan Dist. Comm'n*, 357 Mass. 435, 440-41, 258 N.E.2d 284, 286-87 (1970) (city taking of town park property barred in absence of "explicit legislation" containing statement of the new use and a "recital showing . . . legislative awareness of the existing public use"); *In re Wellington*, 32 Mass. (15 Pick.) 87, 103, 105 (1834) (county commissioners' taking of town property barred by suspension of general powers if legislature has appropriated property to a specific use).

<sup>177</sup> See *State ex rel. Northwestern Elec. Co. v. Superior Court*, 28 Wash. 2d 476, 486, 183 P.2d 802, 808 (1947) (public utility district may take property of electric company to serve the same customers; court will not examine condemnor's determination of necessity absent allegation of fraud or arbitrariness) (quoting *State ex rel. Washington Water Power Co. v. Superior Court*, 8 Wash. 2d 122, 132, 111 P.2d 577, 582 (1941)); see also *Cuyahoga River Power Co. v. City of Akron*, 210 F. 524, 527-29 (N.D. Ohio 1913) (city may take property of publicly franchised corporation under a "paramount right to appropriate property"; court will not question city's implied averment of necessity except for collusion or fraud), *rev'd*, 240 U.S. 462 (1916); *City of Mesa v. Salt River Agric. Improvement and Power Dist.*, 92 Ariz. 91, 104, 373 P.2d 722, 731 (1962) (city may take property of public power corporation for "more necessary" or "higher" public use) (quoting *City of Tucson v. Tucson Gas, Elec. Light & Power Co.*, 152 F.2d 552, 555 (9th Cir. 1945)); *Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878, 882 (Tex. 1973) (school district may take property of city; power might be implied from paramount importance of new enterprise and impracticality of accomplishing school purpose without the taking); *Sabine & E. Texas Ry. v. Gulf & Interstate Ry.*, 92 Tex. 162, 166, 168, 46 S.W. 784, 786-87 (1898) (railroad may take property of another railroad only if

erty is not expressed or necessarily implied in statutory language, the court considers the condemnor's proposed use. If the condemnor states that it will be unable to carry out its public duties without the property, then the condemnor meets the court's standard requiring that its need for the public property must be "absolute."<sup>178</sup> The court finds for the condemnor, inferring a legislative intent to condemn from the fact of the condemnor's absolute necessity.

In the second paradigm, it appears as if the court is making a policy decision regarding the strength of the condemnor's necessity. The court accords great deference to the condemnor's own assessment of necessity, however, because the condemnor is an agent of the legislature. The court performs no substantive analysis of the condemnor's necessity or available alternatives.<sup>179</sup> The court thus bases its holding for the condemnor upon the bravado of the condemnor's pleadings. As in the first paradigm, the court gives no consideration to the necessity or public value of the condemnee's use.

In the third paradigm, the court is even more willing to consider policy, if the legislature has not provided any guidance.<sup>180</sup> The court conducts an equitable balancing of the condemnor's and the condemnee's uses.<sup>181</sup> The court may apply a "reasonable necessity" standard,

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"the necessity be so great as to make the new enterprise of paramount importance to the public, and it cannot be practically accomplished in any other way").

<sup>178</sup> The "absolute" necessity requirement may not be so difficult to meet as it sounds because the court defers to a condemnor's own assessment of its necessity. See *infra* note 179 and accompanying text.

<sup>179</sup> Compare Pennsylvania R.R.'s Appeal, 93 Pa. 150, 159 (1880) (necessity must be so absolute that condemnor's corporate purpose is defeated absent taking, and must arise from circumstances beyond condemnor's control) with *State ex rel. Northwestern Elec. Co. v. Superior Court*, 28 Wash. 2d 476, 485-86, 183 P.2d 802, 807-08 (1947) (city may condemn electrical facilities redundant to existing city facilities, and court will defer to city's determination of necessity for the taking).

<sup>180</sup> See *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 348-51, 225 N.W. 164, 166-67 (1929) (public service corporation lacking statutory authorization may not take state park property if court's balance of uses shows that corporation can "otherwise reasonably carry on its business and exercise its franchise powers"); *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 577, 580, 582-86, 120 A.2d 593, 595, 597-600 (1956) (city may take railroad property only if court's "comparative evaluation" of uses indicates that public interests will be better served, or advantage to condemnor will largely outweigh harm to condemnee); see also *City of Buffalo v. Iroquois Gas Corp.*, 70 Misc. 2d 25, 26-28, 332 N.Y.S.2d 925, 927-28 (Sup. Ct. 1972) (city may not take property of gas corporation, found by court to serve "immediate and critical need" for gas testing, unless city provides replacement property acceptable to corporation).

<sup>181</sup> Balancing uses is an active judicial role that is legitimate only in the absence of legislative action. The balancing role is then proper, and it provides the most rational means to resolve the conflict between condemnor and condemnee. There is no need for the court in the third paradigm to appeal to "implied-in-fact" legislative intent to justify its action. Indeed, the court should not invoke that legal fiction. Appealing to implied-in-fact necessity merely obscures

requiring that the condemnor better serve the public interest than the condemnee, or that the condemnor's advantages from the taking largely exceed the harm to the condemnee.<sup>182</sup>

It appears as if the reasonable necessity standard is more favorable to the condemnor than the absolute necessity standard of the second paradigm. Unlike the court in the second paradigm, however, the court in the third paradigm does not permit the condemnor's allegations of necessity to go unchallenged. In addition to the condemnor's factual pleadings, the court in the third paradigm considers the condemnee's case.

Because the condemnee has legislative authority equal to the condemnor's, the court in the third paradigm need not give greater deference to either party's claim of necessity. The court is free to weigh the facts of each party's use. The court probes each party's allegations in an adversarial proceeding, requesting additional information or requiring the parties to make further study, as appropriate.<sup>183</sup> If the parties do not represent all public interests, the court may accept amicus briefs that bear upon the necessity for the taking.

The court in the third paradigm considers how essential the contested property is, and what alternatives are available, to support each party's use. The court considers both economic and noneconomic factors. In the absence of any legislative guidance, the court also determines the relative public benefit to be derived from the two competing uses. Additionally, the court may address equitable factors, including a party's good-faith dealings and diligent efforts to reach accommodation.<sup>184</sup> The court considers statutory sources of general policy and common-law precedent, insofar as they apply to the facts.<sup>185</sup> The court finds for the condemnor or the condemnee, as the overall balance of facts and policy dictates.

### *B. Proposal for General Adoption of Paramount Public Use Doctrine*

A court should adopt the paramount public use doctrine described in the third paradigm if no statute fairly can be read to resolve a

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the judicial balancing of public uses. See *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 348, 225 N.W. 164, 166 (1929); *Weehawken*, 20 N.J. at 580, 120 A.2d at 597; cf. *infra* note 186.

<sup>182</sup> See *supra* note 64 and accompanying text.

<sup>183</sup> That is, the court can request the parties to brief specific issues that the court finds inadequately addressed. See, e.g., J. SAX, *DEFENDING THE ENVIRONMENT* 222-26 (1971).

<sup>184</sup> See *infra* note 190.

<sup>185</sup> The balancing test may be expedited, and its operation made more predictable, if the court articulates a series of standard factors to be considered. See *infra* note 191.

conflict between the two condemnors.<sup>186</sup> The central feature of the third paradigm is that the court considers both parties' uses. A court should follow *Minnesota Power*<sup>187</sup> and *Weehawken*<sup>188</sup> in even-handed treatment of general condemnors occupying both the condemnor and condemnee roles. A court should, however, dispense with the device of implied-in-fact necessity employed in those cases.<sup>189</sup> If judicial balancing is appropriate, then there is no need to mask it with a search for fictional legislative intent.

A court applying the paramount public use doctrine should weigh each party's need for the contested property, as well as the public necessity for each use. A court should avoid undue deference to either party's claim of need, and should take a broad view of public necessity. The analysis of need should consider each party's alternatives to using the contested property, and any equitable factors supporting each party's use.<sup>190</sup> A court's analysis of public necessity

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<sup>186</sup> This doctrine could be further expanded to encompass contests between a general condemnor and a private property owner who has irrevocably dedicated property to a valuable public use. The legal foundation for such expansion would be that the legislative intent embodied in the condemnor's actions was countered by a strong public policy favoring the condemnee's use. A court would require a clear legislative statement of that public policy to protect use by a private owner who did not possess eminent domain against taking by a general condemnor. California has provided such a policy statement in its eminent domain law. See CAL. CIV. PROC. CODE § 1240.670(a); see *supra* notes 159-67 and accompanying text. Courts have considered contests of the type described. See *President and Fellows of Middlebury College v. Central Power Corp. of Vermont*, 101 Vt. 325, 337-39, 342, 143 A. 384, 389 (1928) (private preserve held in trust for public use cannot be taken by general condemnor). But see *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 267-68, 225 A.2d 130, 134 (1966) (private preserve held open to public use can be taken by statutory authority of federally chartered utility corporation); *Board of Educ. v. Pace College*, 27 A.D.2d 87, 89-91, 276 N.Y.S.2d 162, 164-66 (1966) (property of publicly supervised, nonprofit, private college can be taken by general condemnor).

<sup>187</sup> 177 Minn. 343, 348-51, 225 N.W. 164, 166-67 (1929); see *supra* notes 93-99 and accompanying text.

<sup>188</sup> 20 N.J. 572, 576-78, 582-87, 120 A.2d 593, 595, 597-600 (1956); see *supra* notes 109-24 and accompanying text.

<sup>189</sup> See *supra* notes 92, 104 and accompanying text.

<sup>190</sup> Equitable factors could include each party's good faith and diligence in planning to avoid a public-property taking; in publicly disclosing its plans to prevent others' detrimental reliance; in creating alternatives for its own use; in offering consistent uses; in creating alternatives for an opposing party; and in extra-judicial settlement negotiations. A court might also consider the extent to which each party has been affected by circumstances beyond its control. Additionally, a court might consider the success of each party's use of its other property that is not the subject of the contested proceeding. See, e.g., *Village of Richmond Heights v. Board of County Comm'rs*, 112 Ohio App. 272, 276-79, 166 N.E.2d 143, 147-49 (1960) (setting forth events evidencing each party's good faith and diligence in period preceding property use conflict).

It may be questioned whether issues of equity should be considered in a contest between public entities. Public officials are presumed to act in good faith, for the public benefit. Thus, the public should be well served by whichever party prevails. It might be argued, however,



should encompass long-term public welfare and noneconomic factors implicated by each party's use.<sup>191</sup> Substantive consideration of both parties' uses underlies the principal arguments for the paramount public use doctrine.

The primary argument for judicial balancing of uses is that it is the best way to decide conflicts between general condemners. It is not practical for a legislature to resolve these conflicts individually.<sup>192</sup> Any statutory attempt to provide a hierarchy of all public uses would be unwieldy, and would overlook factors unique to particular public entities and sites. In practice, condemnation proceedings are decided by courts, not by legislatures. The relevant choice is between judicial balancing of uses and judicial application of a more mechanical rule of decision.

Under the first and second paradigms, a court does not consider the desirability of a prior public use. Neither the necessity of the site to the prior use, nor the public benefit derived from the prior use, is given weight in the court's analysis. The court in the first paradigm mechanically rules in favor of condemnees, under the prior

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that the party that behaves most equitably will provide the best stewardship of public property, and best serve the public interest. The use of equitable factors in a court's balancing analysis may be a carry-over from equity in private property disputes, or it may reflect a court's pragmatic view of the actions of local officials. In any event, some courts have employed equitable factors in balancing the necessities of competing public uses. *See supra* notes 116-20 and accompanying text.

<sup>191</sup> A court might employ a "checklist" of pertinent factors to be applied flexibly to suit the circumstances of each case. This checklist should include both factual and policy factors. *See, e.g.,* Comment, *Balancing Public Purposes: A Neglected Problem in Condemnation*, 35 ALB. L. REV. 769, 781 (1971). In addition to economic factors such as costs, relocation expenses, and economic benefits, factual considerations on a court's checklist might include the alternatives available to each party if it does not receive the contested property; the history of public access to an existing use; the history of each party's use of its other property; community acceptance and impacts of each use upon non-parties to the proceeding; whether a taking is part of an integrated plan or redevelopment effort; the existence of any unique cultural or historic value in a property; the existence of any endangered or nonrenewable resources on a property; and the possibility of consequential effects such as water pollution or devaluation of abutting property from a use. A court will take its policy guidance from constitutional and statutory enactments. If these enactments are not germane, a court's checklist of policy factors might include the protection of settled expectations and capital investment in an existing use; the promotion of integrated planning and juxtaposition of complementary uses; the preservation of long-term uses; the promotion of parties' good-faith efforts to reach accommodation; and respect for the wishes of private citizens who dedicate property to public use; as well as the promotion of economic efficiency. It is not unrealistic to expect a court to include a large number of factual and policy considerations in its balance. *See, e.g.,* *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 616, 618-19, 622-24 (2d Cir. 1965) (court considered a broad range of alternatives, noneconomic factors, and long-term factors in review of agency licensing of power plant), *cert. denied*, 384 U.S. 941 (1966).

<sup>192</sup> *See* Matteoni, *supra* note 147, at 570.

public use rule. The court in the second paradigm may operate nearly as mechanically, but with opposite results.

Because the court in the second paradigm does not consider the condemnee's use, it may defer exclusively to the condemnor's assertion of absolute necessity. Thus, the court in the second paradigm is likely to hold for the condemnor, under "implied-in-fact" legislative intent. Common sense suggests, however, that the best public use of a site does not depend upon whether the user happens to be a condemnor or a condemnee.<sup>193</sup> Under the third paradigm, then, a court allocates public property rationally, rather than relying solely upon the arbitrary procedural posture of the parties.

The court in the third paradigm is more willing than the courts in the first and second paradigms to make effective use of its adjudicative expertise. A rule that mechanically allocates property to one party or the other will choose a genuinely superior use in no more than half of the cases. A rational judicial decision, in contrast, may correctly choose the most necessary public use in a large fraction of the cases in which a legislature has provided no guidance to resolve. Because eminent domain proceedings must be decided by courts in all cases, the courts should reach decisions by a method that achieves correct results in the largest possible number of cases.

The third paradigm utilizes a court's broad perspective, divorced from the political concerns of condemnors and condemnees. A court has no corporate stake in the outcome of a conflict over public property use. A court can integrate the necessities of both parties into its analysis. If a court follows the second paradigm, however, these advantages are negated. By deferring to a condemnor's assertion of absolute necessity, a court substitutes the condemnor's judgment for its own.

In contrast to a court, a condemnor may have a narrow conception of the public interest, reflecting only its own area of responsibility. A utility condemnor may be further limited by its primary responsibility to shareholders. These considerations may particularly detract from a condemnor's concern for long-term public benefits, and for the noneconomic values associated with some uses. A court's

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<sup>193</sup> There is no more reason to prefer public uses on a "last in time, first in right" basis than to arbitrarily adopt the mechanical prior public use rule. Similarly, the resolution of the conflict cannot logically turn upon whether the condemnor first sued to condemn, or the condemnee first sued to enjoin condemnation. See *Village of Richmond Heights v. Board of County Comm'rs*, 112 Ohio App. 272, 282-83, 166 N.E.2d 143, 151 (1960) (court applied judicial balancing of uses only because condemnee sued for injunction to block taking).

broad perspective is more likely to result in an impartial assessment of the necessity for a taking.

The third paradigm also utilizes a court's effective fact-finding mechanisms.<sup>194</sup> An adversarial proceeding employs open discovery, expert testimony, and cross-examination to obtain full disclosure of the facts of a conflict. The additional investment in judicial resources to develop an accurate record of both parties' alternatives is rewarded by a more beneficial allocation of valuable public property. The conclusory proceedings of the first and second paradigms rely largely upon one party's unchallenged statements of fact. The third paradigm thus is preferable for its more thorough testing of the facts of a case.

More importantly, the third paradigm's balance enables a court to include the facts supporting both parties' cases in its deliberation. In particular, a court can explore the alternatives available to each party, should that party be barred from using the contested property. Public benefit will be maximized if the party with the best available alternative is compelled to use that alternative.

Beyond the selection of the paramount use for public property, judicial balancing of uses can have additional benefits. A court following the third paradigm has more authority over the parties than a court that, because it follows a mechanical rule, is effectively bound to reach a particular holding irrespective of the merits of the competing uses. A court can use this authority to influence the parties to reach an accommodation.<sup>195</sup> Alternatively, a court may engineer an outcome different from that suggested by either party. As examples, a court may partition contested property,<sup>196</sup> or may permit property to be taken subject to limitations upon the condemnor's use. Novel solutions, created by judicial authority, may result in greater public benefit than a summary holding for either the condemnor or condemnee.

The judicial balancing role of the third paradigm may be criticized as intruding upon the legislative policy-making function. Under the third paradigm, however, judicial balancing is applied only if a legislature has not acted.<sup>197</sup> The restriction upon judicial policymaking

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<sup>194</sup> See J. SAX, *supra* note 183, at 218-25.

<sup>195</sup> See, e.g., *id.* at 222-26.

<sup>196</sup> See, e.g., *Township of Weehawken v. Erie R.R.*, 20 N.J. 572, 585-86, 120 A.2d 593, 600 (1956); cf. *Richmond Heights*, 112 Ohio App. at 285, 166 N.E.2d at 152.

<sup>197</sup> A court will conduct a balance of public uses only if there is no legislative intent to permit a condemnor to take public property expressed, or necessarily implied, in the language of a statute. A legislature may include a provision enabling a general condemnor to take public property in the statute granting eminent domain or in a separate enactment. If there is no

is not one of kind but of degree. Courts continuously make policy decisions through statutory interpretation, through the resolution of conflicts of laws, and through extensions of common-law principles.<sup>198</sup> Conflicts between general condemnors represent a class of cases from which legislative intent is often absent. If there is no possibility of contradicting legislative intent, judicial policy determination is appropriate.

The judicial balancing role of the third paradigm may also be criticized as judicial interference in a condemnor's area of expertise. A condemnor may have a high degree of technical knowledge about its own requirements. A condemnor may also have broad planning authority and responsibility to coordinate taking and development of property extending over a large region. A court, in contrast, may have little special knowledge of a condemnor's programs.

These factors do not detract from a court's ability to decide property-use conflicts, any more than they would disqualify a court from deciding other technical cases.<sup>199</sup> No matter how expert a condemnor is regarding its own needs, it may lack knowledge or objectivity in assessing the condemnee's requirements. A court can weigh the public necessities of both parties. Through the trial process, a court can acquire sufficient knowledge to make an informed decision. Legislative recognition of judicial competence to evaluate takings made on the legislature's behalf<sup>200</sup> suggests that courts possess sufficient expertise to balance the uses of general condemnors.

The balancing of uses is not a novel role for courts to assume. Courts of equity have long performed a similar function in deciding whether injunctions should be issued.<sup>201</sup> The "reasonable necessity" standard utilized in the third paradigm is similar to the standard

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such statutory provision, then it is a reasonable inference that the legislature has not considered the problem. Alternatively, the legislature has not established a sufficient consensus to enact such a provision. In either event, there is no legislative "intent" with regard to the taking of public property. Thus, there can be no judicial abrogation of legislative intent. See *supra* note 181.

<sup>198</sup> See, e.g., *Norway Plains Co. v. Boston and Maine R.R.*, 67 Mass. (1 Gray) 263, 267-68 (1854) (cases for which there is no precedent can be decided under "considerations of reason, justice and policy, which underlie the particular rules of the common law"); cf. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (suggesting that federal district court may act in the role of "policy planner and manager," as well as legislator, when issuing a decree).

<sup>199</sup> See J. SAX, *supra* note 183, at 150; cf. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 35-36 (D.C. Cir.) (court reviewing agency action in technical case has duty to make "intensive" effort to understand the evidence) (dictum issued in context of arbitrariness review of informal rulemaking), *cert. denied*, 426 U.S. 941 (1976).

<sup>200</sup> See *supra* notes 159, 166-67 and accompanying text.

<sup>201</sup> See 42 AM. JUR. 2D *Injunctions* § 56 (1969).

applied in granting injunctive relief.<sup>202</sup> Under the third paradigm, a court must weigh public harm and benefit, as it would in granting injunctive relief against a public nuisance.<sup>203</sup> Courts also have expertise in weighing public necessity in cases that involve fundamental rights.<sup>204</sup> Thus, the judicial balancing of public uses is a role that courts are qualified to perform.

#### IV. CONCLUSION

The paramount public use doctrine offers a rational method for deciding eminent domain proceedings between two entities with general condemnation power. A court identifies the paramount use through a judicial balancing of the competing uses. The balance weighs both parties' needs for the contested property. The court also considers the alternatives available to each party, and the public benefit produced by each use.

Some courts have avoided judicial balancing of uses as an infringement on the legislative policy-making function. These courts have applied the prior public use rule, or, in some cases, have sought an implication of a condemnor's authority from necessity implied in fact. The prior public use rule arbitrarily allocates public property to a condemnee. The implied-in-fact necessity rule allocates property to a condemnor, if a court defers to its claim of necessity. Neither of these rules of judicial deference gives consideration to the substantive arguments for both competing uses.

Judicial balancing occurs only if it is clear that there is no applicable legislative intent. Judicial balancing is a legitimate means to resolve a conflict over the use of a specific, publicly owned site. Balancing also utilizes a court's broad, disinterested perspective to enable more effective resolution of public use conflicts than is obtained if a case is decided by a mechanical rule.

In the absence of statutory guidance, courts should adopt judicial balancing to decide eminent domain proceedings between general condemnors. This adoption will help to ensure that public property is allocated according to a rational evaluation of its potential uses. The result will be effective judicial determination of the paramount public use.

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<sup>202</sup> Compare *id.* with *supra* note 64.

<sup>203</sup> See 42 AM. JUR. 2D *Injunctions* § 59 (1969). Compare *supra* note 107 and accompanying text with *supra* note 141 and accompanying text.

<sup>204</sup> See *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 418-20, 509 P.2d 1250, 1253-54 (1973).